No. 640. 172

Brief of Peckham for Respondent

Office Supreme Court U. S.
FILED
MAR 13 1899
JAMES H. McKENNEY,
Clerk

United States Supreme Court.

Filed Mar. 13, 1899.

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THE CITY OF NEW ORLEANS,
Petitioner,

vs.

JOHN G. WARNER,
Respondent.

This is a *certiorari* issued by this Court on the petition of the City of New Orleans defendant below to the United States Circuit Court of Appeals for the Fifth Circuit.

Statement.

The respondent John G. Warner filed his bill of complaint against the City of New Orleans in the Circuit Court of the United States for the Eastern District of Louisiana.

To the bill of complaint the defendant City of New Orleans demurred, and the Court sustained the demurrer.

On appeal the Circuit Court of Appeals certified to this Court certain questions which were answered (see 167 U. S., 467.

The Circuit Court of Appeals thereupon reversed the decree of the Circuit Court and overruled the demurrer and required the defendant to answer the bill.

The defendant answered and complainant filed a repli-

cation and proofs were taken and the cause heard on pleadings and proofs and a decree rendered for defendant.

Complainant thereupon appealed to the Court of Appeals which reversed the decree and rendered a decree in favor of complainant.

The decree reverses the decree of the Circuit Court and remands the case to the Circuit Court, with directions to enter a decree ;

1. That the city is a debtor to Warner in $6,000, with eight per cent. interest from June 6, 1876, and that Warner is entitled to be paid that sum *out of the drainage assessments set forth in the bill.*

No *personal* judgment against the city is given.

2. That the drainage assessments, including those against the city assessee of the streets and squares, constitute a trust fund in the hands of the city, for the purpose of paying complainant and other holders of the same class of warrants.

3. That it be referred to a master to take the accounts, and that in taking them the master charge the city with the amount of drainage assessments against the city on account of streets and squares as well as with those against the owners of private property, give credit only for the sums already collected and properly expended, but that no offset be allowed for the bonds issued in exchange for drainage warrants under the Act of 1872.

4. That the master gave 30 days' notice to warrant holders to appear before him and establish their claims.

5. That upon the coming in of the report the complainant and those who have established their claims "will be entitled to an absolute decree against defendant for the amounts found due them if the fund established by the

accounting shall be sufficient" if not *pro rata*, and shall have execution.

6. That defendant pay the costs.

On the petition of the City of New Orleans this Court awarded a certiorari to review that decree.

The assignments of error are 19 in number, and are found on page 577 *et seq.*, and are both argumentative and repetitious.

The bill of complaint was filed for the benefit of complainant and all others similarly situated to hold the City of New Orleans liable for breach of trust by failure to collect, and by preventing the collection of drainage assessment warrants from individuals and from herself as assessee, because of streets and squares.

The Court below found that the city was guilty of such breach of trust and charged her with the assessments which she had so wrongfully failed to collect and directed that no offset be allowed for the bonds issued in exchange for drainage warrants under the Act of 1872.

POINTS.

First.—It surely should be regarded as a fact settled and beyond dispute in this litigation that the City of New Orleans has neglected the duties imposed upon her as trustee under the acts and contracts disclosed in this record to collect the assessments levied for drainage.

The Court below (p. 590), says that "all the facts averred in the bill have either been admitted by the answer or abundantly established by evidence."

That "the *only fact* in dispute between the parties is the question of responsibility for the alleged defects in the drainage plan. So far, however, as the answer attempts to fasten this responsibility on the Canal Company and Van Norden its transferee as a defense to this action *it is entirely unsupported by the evidence, as the counsel for the city very frankly admitted in their argument at the hearing.*"

So that, in the opinion of the Court below, that the city had, as matter of fact, neglected her duties and abandoned the work and advised the owners of property assessed not to pay the assessments, *was not really controverted.*

The State Courts have taken the same view of the facts and adjudged in Davidson *vs.* New Orleans, that the city "had abandoned the work without any probability of ever renewing it."

This Court in Peake *vs.* New Orleans, 139 U. S., 848, in the statement of facts preceding the opinion, says, in respect to the action of the city after the purchase of the property to pay for which the warrants in suit were issued, "Little, if any, work was done thereafter by the city and the abandonment of the work resulted in largely destroying the value of that which had been done, the rusting and decay of the machinery and tools and the innundation and overflow of the portions of the lands attempted to be drained.

Now, if there is any one thing more than another which confessedly was decided by this Court in this case, when the case was certified here, it is that in so abandoning the work the city committed a breach of duty to Van Norden, complainant's assignor. In 167 U. S., p. 477, this

Court says: "and *the proposition* which we affirm is, that one who purchases property, contracting to pay for it out of a particular fund, and issues warrants therefor payable out of that fund—a fund yet partially to be created, and created by the performance by him of a statutory duty—*cannot deliberately abandon that duty, take active steps to prevent the further creation of the fund*, and then there being nothing in the fund, plead in defense to a liability on the warrants drawn on that fund that it had, prior to the purchase, paid off obligations theretofore created against the fund."

Thus the contract of purchase by the City pursuant to the law of 1876, by which the City agreed (p. 476) "*not to obstruct* or impede, but on the *contrary*, to facilitate by all lawful means the collection of drainage assessments as provided by law until said warrants have been fully paid, it being well understood and agreed by and between the said parties thereto that collection of drainage tax assessments should not be diverted from the liquidation of said warrants and expenses under any pretext whatsoever until the full and final payment of the same" was held by this Court to be valid and effective, and to impose on the City the duty of going on with the work, and of not abandoning the work to the prejudice of complainant.

If we turn to the evidence in the record it is equally full and conclusive (Record, pp. 274, 91 to 97, 225 to 230, 216, 217, 218, 219, 271, 349 to 352, 319 to 349).

Second.—It must further be regarded as settled that the issue by the city of its bonds in taking up prior warrants is no defense to this suit.

That was the precise question certified and answered in 167 U. S.

That the complainant's assignor knew of the issue of those bonds, and himself took the whole of them in exchange for warrants which he then held, is without significance.

There is no allegation in the bill, there was no averment in the statement of the Court below, as the basis for the certified question, to the effect that such assignor or complainant did not know of the issue of such bonds.

The decision of this Court is not based on knowledge or lack of knowlege of Van Norden. It is based on the duty of the defendant to go on with the work and not to abandon it.

It is not thinkable that defendant at the time of purchase intended to abandon and to plead the issue of these bonds and that Van Norden knew that defendant so intended for the contract is expressly otherwise and in such case Van Norden would be selling without any chance of realizing any consideration.

Moreover, in fact, the city though repeatedly sued never did set up the issue of these bonds as a defense until some one long after the sale by Van Norden discovered and set up the defense in the Peake case. The purchase by the City was made in June, 1876. The answer in the Peake case was filed November 26, 1892, p. 492.

Until the discussion of the Peake case Van Norden knew and had heard of nothing of any claim of the City that its bonds should be credited on its liability to the fund pp. 250 and 254.

Third.—It follows as a corollary that the city must be charged as if she had collected these assessments.

She knew and must be charged with knowledge of the law of Louisiana decided in the Davidson case. That abandonment of the work gave to the assessees a good defense.

It was her duty as the one who had assumed the obligation to do this work to go on with it, at least to the extent of not affording by her default any defense to the assessees to the enforcement of the warrants.

She deliberately fails in that duty and by her act makes worthless the very warrants with which she had purchased our property.

Surely, she is liable to account to us as if she had performed the duty cast upon her.

She may abandon of course; but she must do it at her cost and not at ours.

Reilly *vs.* Albany, 112 N. York, 30, and cases cited.
Cummings *vs.* The Mayor, 11 Page, 596.
Beard *vs.* Brooklyn, 31 Barb., 142.
Hunt *vs.* Utica, Opinion, 23 Barb., 398.
Atchison *vs.* Byrnes, 22 Kansas, 65.

Fourth.—The City now assigns as error that the Court below has rendered a personal judgment against the City.

It has not, but it would be no error if it had. The decree directs an account and that the City be charged with the assessments and credited with collections properly expended.

That is not a personal judgment for the claims may so exceed the assessments.

It is, undoubtedly, a decree charging the City with all the assessments and in that it is right.

The very essence of the liability of the City in this case is that it bought our property and paid for it in assessment warrants. That these warrants could be good for anything only if the City discharged her duty in respect to collecting the assessments. If the City did not do so but abandoned the improvement, *if the City gave to the assessees* a perfectly valid defense to the assessment and to the warrants, the City failed in her duty and must be charged as if she had collected.

In the case of assessments for improvements, the contractor agreeing to take the warrants in payment, a City does not perhaps warrant that that the assessments are collectible out of the property so far as value is concerned, but she does warrant the validity of the assessments and surely at the very least and even without the affirmative covenant in this contract, she warrants that the City herself will do nothing to impair the validity of the warrant and that she will go on and continue and finish the improvement so as to give to the property the value because of giving which the assessment was made.

That the City did abandon the work and did thereby give to the assessees a defense, they otherwise would not have had is not an open question in this case and is conclusively shown to be true as matter of fact by the adjudication in the Davidson case (pp. 532–535). Surely it can need no citation of authorities for the position that neither a municipal corporation nor any other

can contract for work or property to be paid for by the exercise of its taxing or assessing power and then after having received the work or property turn around and either by action or non-action practically vacate the assessment.

Such an act would be too great "a strain upon the moral sense" to receive the sanction of any Court.

And the rule is the same as to its duty to do the work, to the end that the property assessed may derive the value for which it is assessed.

The City did not guarantee value—but it did guarantee to do the work.

Mistakes of judgment might be made as to how much the value would be increased.

Were the work done it would be no defense to the warrant that the value had not been to that extent increased; but it is plain as can be that if the assessment is made and the work *not* done, collection is robbery.

The City has given some testimony as to the small value of some of this assessed property. It is wholly immaterial. The City has given no testimony as to what the property would be worth with the *work done.*

The benefit that the property would derive from the work has been assessed, *i. e.*, ascertained in the most solemn manner and the tableaux homologated by the Courts.

The City as a negligent and culpable and voluntary trustee cannot be heard to say that the property with the work done would not be worth the assessment.

We say nothing against the right of the City, in the interest of its inhabitants to abandon the

work—to give up this or any system of drainage; what we say is that common honesty, even the lowest code of morals require city and inhabitants to do so at their own expense and not at the expense of the contractor or vendor who did all that he had agreed to do.

If the plan proved bad, inadequate, or in any respect insufficient, that was not the fault of the contractor.

The City purchased from him this property and paid for it in these warrants. It agreed not to obstruct or impede their collection; it agreed to facilitate their *collection* by all lawful means; and it forthwith proceeded to abandon the work, thus absolutely preventing their collection.

Surely in such case the City as trustee should be charged with the face of the assessments, the collection of which it has thus in violation of its contract prevented.

Fifth.—The assessment on the streets and squares is effective, and as the dissenting opinion in Peake *vs.* N. Orleans, 139 U. S., p. 369-379, says, "should under the circumstances be considered as money in hand." The assessment on streets and squares was a part of the original proceedings when the assessments were in the hands of the old boards.

To the proceedings for homologating the tableaux the City of New Orleans was a party, and judgment of assessment was rendered against her.

She took no proceedings to vacate or reverse

that judgment. It was open to her to do so. In all the multiplicity of proceedings and litigations that have occurred in respect to the drainage acts and warrants, the City has at no time prior to the Peake case claimed that such assessments were illegal.

Aside then from the question of the conclusiveness of the homologation judgments, we have this cotemporaneous construction of these acts that the city was liable to be assessed and that she was properly assessed.

Does *justice* require that, after others have acted on the faith of those assessments and of the judgment of homologation, the city should now, thirty years after, be allowed to plead non-liability?

And would it not be the grossest injustice to allow it?

And with regard to the judgments:

If the city had any defense to the assessments she had the opportunity to make it. Not making it, it is familiar law that the judgment is quite as conclusive as to all defenses which might have been made and were not as it is as to all defenses which were made and were overruled (Jordan *vs.* Van Epps, 85 N. York, 427; Reich *vs.* Cochran, 151 N. Y., 122, 127).

And why should not the city contribute? Whether the city, or in other words, the general public contributes to the cost of a great public improvement directly out of its general fund, or indirectly by assessment on public property such as streets and squares, is of little moment. Each method has been frequently adopted. When a public improvement is of great general utility, or is contemplated to be such, it is beyond question

right that a greater or less portion of the expense should be borne by the public.

Certain private property is supposed to be *especially* benefited and that *therefore* it should bear a more than average proportion of the expense is the principle on which assessments are levied.

That such private property and its owners are the *only* persons or property benefited would form no basis for an assessment or for the doing of the work by the public.

It would not then be a public but a private work. The public would have no interest and proceedings by the public to improve the property of private persons without their consent would be sheer nonsense and void.

The basic fact that a *public* improvement is contemplated *necessitates* the corollary that for some proportion of that improvement the public must pay. A failure so to do would be robbery, in that the cost of what was done for the general good would be assessed upon a few and a few made to pay for the benefit to the many.

Unless, therefore, there is something in the jurisprudence of Louisiana which compels the rejection of the assessment on the streets and squares, simple justice requires that such assessment should be sustained. Surely no such construction can be claimed for the Louisiana decisions. To say the least of them, their tendency is in accord with and not in opposition to the principle of a fair *public* contribution to the expenses of a public improvement and gives no sanction to the idea that the great State of Louisiana intended any such spoliation as would be the necessary consequence of a failure to recognize such principle.

Not only the purchase of the material by the City in 1876, but every single dollar's worth of work done and goods sold for this improvement has been upon the faith of this assessment on the City and under the law of Louisiana, and, we believe of every civilized community, the City when it drew warrants on a fund a large part of which consisted in her own assessments and liabilities as expressed in the tableaux and adjudged in the judgments of homologation warranted and agreed that that fund existed and that the assessments against herself were just and valid and would be paid and if she, under those circumstances, fails to pay such assessments she must be charged with them as if she had paid them as a consequence of her breach of trust.

Sixth.—The claims of the City of *res adjudicata* and of the Statute of Limitations and of unconstitutionality do not seem to merit serious attention.

(*a.*) It has ordinarily been supposed that to constitute an adjudication the former judgment must have been between the same parties or their privies.

The Peake case is not of that character. The warrants here sued on were not in that case. If any warrants similiar to those here sued on were in that case it may be that the holders of such warrants would meet with difficulty should they attempt to prove them under the decree herein.

No such question is or can be before the Court

now. No one pretends that the warrants which herein are adjudged were in the Peake case either by the present or any former holder.

One suing for himself and others similarly situated does not represent the others and a judgment does not bar them until and unless they come in and become parties to the suit.

(*b.*) As to the defense of a Statute of Limitations or prescription the jurisprudence of Louisiana does not differ from that of other States. The statute does not apply to or run against a trustee.

(*c.*) As to the constitutional question of exceeding the debt limitation, it has never been supposed that such provision protected a city from liability for a tort or breach of trust.

The City will not in this case increase its indebtedness. It will levy the tax which it was bound to levy.

Seventh.—Judgment of the Circuit Court of Appeals should be affirmed.

WHEELER H. PECKHAM,
Of Counsel for Complainant.